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CORRUPT PRACTICES IN INDIA: NO PAYOFF

I. INTRODUCTION

Foreign investors constantly seek new business locations to increase profits and decrease expenses. With one of the fastest growing economies in the world, India is a popular site for foreign investment.¹ India, however, suffers from a major problem which threatens U.S. investment—corruption. A Gallup survey conducted throughout India reported that corruption is one of the most serious problems plaguing the country.² India's current anti-corruption laws are ineffective; hence, U.S. corporations find it increasingly difficult to follow the requirements of the U.S. Foreign Corrupt Practices Act (FCPA) while doing business in India, "one of the most corrupt countries in the world."³

This comment analyzes the FCPA and its relationship to foreign investment in India. Part II describes the inception, structure, and provisions of the FCPA, including the anti-bribery and accounting provisions. In addition, it focuses on the 1988 Amendments' effect on FCPA provisions, defenses, and penalties. Part III explores the interests and benefits of foreign investment in India. Part IV discusses corruption and the causes of corruption in India, Indian laws dealing with corruption and bribery and the effect of corruption on foreign investment in India's telecommunication and power sector. Part V discusses the benefits and burdens of the FCPA on U.S. investors. Part VI analyzes the feasibility of current efforts in India to combat corruption. Finally, Part VII proposes alternative solutions for foreign investors to the Indian corruption problem.

1. See *India's Economic Nationalists*, THE ECONOMIST (UK), Aug. 12, 1995, available in 1995 WL 9570136. "Industrial output-growth averaged 8.4% in 1994-95; exports were up by 27% over a year earlier in the April-June quarter of this year (1995); inflation has dipped below 10%." *Id.*

2. See *Indians Trust Armed Forces, Supreme Court; No Faith in Police*, INDIA JOURNAL, Oct. 18, 1996, at A4.

3. Rahul Bedi, *Greed Achieves Recognition*, S. CHINA MORNING POST, July 18, 1996, available in 1996 WL 3762224.

II. FOREIGN CORRUPT PRACTICES ACT

A. History and Structure of the FCPA

In response to numerous scandals, the U.S. Securities and Exchange Commission (SEC) began investigating questionable payments to foreign officials by U.S. Companies.⁴ These investigations revealed that over 400 U.S. companies, including many Fortune 500 companies, admitted making over \$300 million in illegal payments to foreign government officials, politicians, and political parties.⁵ In response, Congress enacted the FCPA.⁶ The FCPA prohibits bribery of foreign government officials, requires additional accounting measures, and grants joint enforcement responsibilities to the SEC and the Department of Justice (DOJ).⁷

Under the FCPA, it is unlawful to make a payment to a foreign official for the purpose of influencing the official to act in the company's favor.⁸ The requisite knowledge is established if the company or individual "is aware of a high probability of the existence of [the] circumstances [for improper payment]."⁹ Knowing or having reason to know that the recipient will use all or any portion of the payment to bribe foreign officials is a violation under the FCPA.¹⁰

The "reason to know" requirement is characterized as one of the most ambiguous and controversial parts of the FCPA,¹¹ in part because it is measured by both an objective and subjective standard.¹² This proves problematic, especially for U.S. companies, because doing business in foreign nations decreases their control over intermediaries who may potentially engage in

4. See generally S.E.C., 94th CONG., 2D SESS., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) [hereinafter SECURITIES AND EXCHANGE COMM'N].

5. See HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 95-640, at 4 (1977).

6. See *id.*

7. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1464 (1977) (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1988)) [hereinafter FCPA].

8. See 15 U.S.C. § 78dd-2(a)(1) to (2).

9. See *id.* § 78dd-2(h)(3)(B).

10. See *id.* § 78ff(a).

11. See John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009, 1015 (1990); see also, Julia Christine Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 LAW & POL'Y INT'L BUS. 447, 448 (1989).

12. See Bliss & Spak, *supra* note 12, at 448.

bribery. Thus, business executives argue that an objective "reason to know" standard is impractical and difficult to define in the context of international business transactions.¹³

The FCPA is composed of three main sections: (1) antibribery provisions,¹⁴ (2) accounting provisions,¹⁵ and (3) penalty provisions.¹⁶ The FCPA provisions apply equally to officers, directors, stockholders, agents, and employees of a company.¹⁷ Notably, foreign officials who receive the bribes, however, are not liable under the FCPA.¹⁸

B. FCPA Anti-Bribery Provision

The anti-bribery provision of the FCPA has five elements.¹⁹ It prohibits U.S. companies from using interstate commerce to pay foreign officials for the purpose of influencing that official for the purpose of obtaining or retaining business.²⁰ The anti-bribery provision applies to both domestic concerns and SEC reporting companies or issuers.²¹ A domestic concern includes any individual, citizen, or resident of the United States.²² It also includes any business entity, incorporated or conducting business

13. See *id.*

14. See 15 U.S.C. §§ 78dd-1(a) to -2(a).

15. See *id.* § 78m(a)-(b).

16. See *id.* §§ 78dd-1(d), 78ff(b)-(c).

17. See *id.* § 78ff(c)(2)(B)-(C).

18. See *United States v. Castle*, 925 F.2d 831, 832 (5th Cir. 1990).

19. The relevant provisions provide:

(1) makes use of the mails or any means or instrumentality of interstate commerce;

(2) corruptly in furtherance of an offer, gift, payment, promise to pay, or authorization of the payment of any money or anything of value;

(3) to any "foreign official," foreign political party, foreign political party official, or candidates for office (collectively, "foreign recipient"), or to any person while "knowing" that all or a part of the thing will be offered to a foreign recipient;

(4) for the purpose of influencing any official act or decision or inducing the foreign recipient to act in violation of his lawful duty, or induce such recipient to use his influence with a foreign government or instrumentality to affect any decision of that government or instrumentality;

(5) in order to assist the public company or domestic concern in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-2(a)(1)-(2) to -1(d)(2).

20. See Delia Poon, Note, *Exposure to the Foreign Corrupt Practices Act: A Guide for U.S. Companies With Activities in the People's Republic of China to Minimize Liability*, 19 HASTINGS INT'L & COMP. L. REV. 327, 332 (1996).

21. See 15 U.S.C. § 78dd-1 to -2(h)(1).

22. See *id.* § 78dd-2(h)(1).

principally in the United States.²³

Although the FCPA initially appears straightforward and inflexible, significant exemptions and ambiguities exist. For example, the antibribery provision exempts certain payments from liability, such as the "grease payments" exception. These are payments made to facilitate or expedite the performance of "routine governmental actions" by a foreign official.²⁴ Another exemption includes payments made to foreign officials performing "ministerial or clerical" duties.²⁵ The FCPA, however, prohibits payments made to a foreign official whose duties involve decision making. Thus, the Act essentially allows bribes to a secretary or clerk to hasten permit-processing, but prohibits bribing a foreign minister to secure a contract. In practice, U.S. business executives, as well as the SEC, find it difficult to distinguish between an allowable "grease payment" and a prohibited bribe under the FCPA.²⁶

C. FCPA Accounting Provision

The accounting provision supplements the anti-bribery provision of the FCPA and it applies to SEC reporting companies.²⁷ It was enacted to make it difficult for companies to maintain and conceal "slush" funds.²⁸ The SEC reported that many companies maintain "slush" funds outside their books for use in bribing foreign officials.²⁹ Thus, the accounting provision requires every issuer who has certain classes of shares registered with the SEC: (1) to make and keep books, records, and accounts, that in *reasonable detail* accurately and fairly reflect the transactions and dispositions of the assets of the company; and (2) to devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances*³⁰ that the following objectives are satisfied: (a) corporate assets and transactions are safeguarded from unauthorized use; (b) corporate transactions conform to managerial authorizations; and (c) corporate records

23. *See id.*

24. *See* 15 U.S.C. § 78dd-1(b) to 2(b).

25. *See id.* § 78dd-1(a)(3); Impert, *supra* note 11, at 1015.

26. *See* Impert, *supra* note 11, at 1015.

27. *See* 15 U.S.C. § 78m(b)(6).

28. *See* SECURITIES AND EXCHANGE COMM'N, *supra* note 4, at 48.

29. *See id.* at 37-38.

30. *See* 15 U.S.C. § 78m (emphasis added).

are accurate.³¹ These requirements ensure accountability for any illegal payments made to government officials.³²

The FCPA defines reasonable detail and reasonable assurance as "the level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."³³ The SEC has commented that the reasonableness standard allows "flexibility in responding to particular facts and circumstances."³⁴ A materiality standard is, therefore, inappropriate to determine either the accuracy of corporate records or the effectiveness of internal corporate control.³⁵

The accounting provision provides a safe harbor exemption for U.S. parent companies that do not have a majority ownership interest in their subsidiaries or affiliates.³⁶ Compliance is presumed when a U.S. issuer holds a minority of the voting shares of its foreign subsidiary, and the U.S. parent company demonstrates a good faith effort to cause its subsidiary to comply with the FCPA accounting provision.³⁷ The good faith effort, however, must be reasonable under the circumstances. The reasonableness of the effort is determined by examining: (1) the relative degree of the issuer's ownership, and (2) the laws and practices governing business operations of the country where the subsidiary is located.³⁸

D. 1988 Amendments to the FCPA

Due to ambiguities and controversies surrounding certain sections of the FCPA, Congress amended it as part of the 1988 Omnibus Trade and Competitiveness Act (1988 Amendments).³⁹ The 1988 Amendments primarily affected the knowledge requirement, the definition of grease payment, the affirmative defenses to the FCPA, and the penalties under the FCPA.⁴⁰

31. See SEC Chairman Harold Williams, Address Before the SEC Developments Conference of the American Institute of Certified Public Accountants (Jan. 29, 1981), in 46 Fed. Reg. 11544, 11546-47 (1981) [hereinafter Chairman Address].

32. See 15 U.S.C. § 78m(b)(2)(A).

33. See *id.* § 78m(h)(7).

34. Chairman Address, *supra* note 31, at 11546.

35. *Id.*

36. See 15 U.S.C. § 78m(b)(6).

37. See *id.*

38. See *id.*

39. See Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755, 759 n.28 (1989).

40. See *id.* at 759 n.27.

The structure of the original "reason to know" standard of the FCPA prevented a defendant from avoiding liability by ignoring reasonable indications that an agent or intermediary engaged in bribery.⁴¹ The standard forced U.S. companies to examine potential liability under the FCPA if a local agent engaged in bribery to gain economic advantages.⁴² The Amendments removed the "reason to know" element, leaving only the element of "knowing."⁴³ The standard now reads:

[A] person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if (i) such person is aware that the other person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.⁴⁴

Under this Agreement, a company will not escape liability if it engaged in willful blindness or deliberate ignorance.⁴⁵ A company can, however, escape liability if the company or individual is merely guilty of "simple negligence."⁴⁶ Although the amended standard of knowledge is more clearly defined, ambiguities still exist.⁴⁷

The amendments also adjusted the definition of grease payments. Prior to the amendments, the legality of grease payments depended on the status of the foreign official who received the bribe. A corporation could bribe foreign officials who merely performed ministerial or clerical duties.⁴⁸ The 1988 Amendments changed this by defining a grease payment by its purpose, rather than by the recipient. The 1988 Amendments also excluded payments to any foreign official to obtain "routine governmental actions."⁴⁹ This amendment may, however, have

41. See 15 U.S.C. § 78dd-1(a)(3).

42. See *id.* § 78dd-1(b) to -2(b).

43. See *id.* § 78dd-2(h)(3).

44. *Id.*

45. See H.R. CONF. REP. NO. 100-576, at 919, 920 (1988).

46. See *id.*

47. See Christopher L. Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But for How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 299 (1994).

48. See 15 U.S.C. § 78dd-2(d)(2).

49. See *id.* § 78dd-2(h)(4)(A).

Routine governmental action is an action which is ordinarily and commonly performed by a foreign official in (i) obtaining permits, licenses, or other official

little effect because the intermediaries making the illegal payments are often unaware that the United States is their client and that U.S. law prohibits bribes.⁵⁰

The 1988 Amendments added two affirmative defenses to the FCPA provisions.⁵¹ First, the payment of a gift, offer, or promise of anything of value is lawful, if the written laws and regulations of the foreign official's country permit such payment.⁵² This defense, however, has little significance because in most countries, corruption and bribery are still illegal.

Second, it is an affirmative defense if the payment, gift, offer, or promise of value made was a reasonable and bona fide expenditure which directly related to: (1) promotion, demonstration, or explanation of products or services; or (2) execution or performance of a contract with a foreign government or agency.⁵³ Travel and lodging expenses for a foreign official fall under this defense—if used to reimburse foreign officials for visits or tours of manufacturing facilities.⁵⁴

The SEC and DOJ may impose both criminal and civil penalties for FCPA violations.⁵⁵ The SEC is responsible for the civil enforcement of accounting and reporting violations. In addition, the SEC seeks to enjoin civil violations by reporting companies and any related individuals.⁵⁶ The DOJ exclusively controls criminal prosecutions⁵⁷ and also has jurisdiction over civil violations by domestic concerns. In addition, the DOJ is responsible for initiating criminal prosecutions of anti-bribery

documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) processing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

Id.

50. See Impert, *supra* note 11, at 1015.

51. See 15 U.S.C. § 78dd-2(c)(1).

52. See *id.*

53. See *id.* § 78dd-1(c)(2) to -2(c)(2).

54. See Impert, *supra* note 11, at 1016.

55. See FCPA, *supra* note 7.

56. See Notification of Enactment of Foreign Corrupt Practices Act, Exchange Act Release No. 14,478, 1978 SEC *Lexis* 2210, at 5-8, (Feb. 6, 1978). The SEC can conduct civil enforcement in the form of investigation, bring civil injunction and administrative proceedings, and refer cases to the DOJ for criminal prosecutions. See *id.*

57. See S. REP. NO. 95-114, at 1, 3 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4109.

violations by reporting companies and domestic concerns.⁵⁸

The 1988 Amendments doubled the maximum corporate fine to \$2 million, and increased the maximum penalty for an individual, corporate officer, director, employee, agent, or stockholder committing a willful violation from \$10 thousand to \$100 thousand.⁵⁹ In addition, corporate officers, directors, employees, agents, or stockbrokers face five year maximum sentences for FCPA violations.⁶⁰ The regulatory agencies can impose civil penalties of \$10 thousand and injunctive relief against any company, employee, officer, director, or agent committing a willful violation of the FCPA.⁶¹ Furthermore, the the 1988 Trade Act Conference Report states that the FCPA's penalty provisions do not preempt other statutes that provide for alternative fines.⁶²

III. FOREIGN INVESTMENT IN INDIA

A. India as a Lucrative Site for Foreign Investment

India is one of the most attractive and fastest growing markets in the world.⁶³ Foreign exchange reserves were twenty times higher in 1996 than they were in 1991.⁶⁴ India has the world's second largest population, fourth largest rail system, seventh largest land area, and tenth largest economy.⁶⁵ Foreigners invested a record \$2.03 billion in the fiscal year ending March 31, 1996.⁶⁶ In light of its limited resources, India's economic performance is impressive.⁶⁷ The Economist Intelligence Unit's (EIU) predicted a growth forecast for India during the 1996/97 fiscal year of 5.4%.⁶⁸ These statistics reflect India's growing

58. See 15 U.S.C. §§ 78dd-1(d), 78ff(a)-(c).

59. See *id.* § 78dd-2(g).

60. See *id.*

61. See *id.* §§ 78dd-2(g)(1)(B), 78dd-2(g)(2)(C), 78ff(c)(1)(B), (2)(C), 78dd-2(d)(1).

62. See H.R. REP. NO. 576, at 924 (1988).

63. See Jack A. Shaw, *Two Nations' Unrealized Business Opportunity*, INDIA ABROAD, Sept. 13, 1996, at 3.

64. See *id.*

65. See *id.*

66. See Peter Waldman & Miriam Jordan, *Taking Stock: Fiasco at Indian Blue Chip Teaches Investors a Lesson*, ASIAN WALL ST. J., Apr. 22, 1996, available in 1996 WL-WSJA 3332526.

67. See Surendra Kaushik, *India's Democratic Economic Transformation*, CHALLENGE, Sept. 19, 1996, available in 1996 WL 9035754.

68. See 1196 3rd QUARTER COUNTRY REP. INDIA NEPAL 1, 6 (1996) [hereinafter COUNTRY REPORT].

economy, making it an attractive site for foreign investment.

In addition, projects estimated at 40 billion rupees (U.S. \$1.2 billion) currently await government approval,⁶⁹ including investors such as: Coca-Cola; BMW; Bacardi; Carlsberg; William Grant; Marie Brizard; Shell Oil; Caltex; and Texas Instruments.⁷⁰ Approximately \$200 million flows monthly in foreign direct investment from companies such as PepsiCo, McDonalds, IBM, Hewlett-Packard, GM, GE, Duracell, Black & Decker, AT&T, NYNEX, and other blue-chip companies.⁷¹

B. India's Political Instability's Effect on Foreign Investment

While the Indian government is enthusiastic about attracting foreign investment, its political instability concerns many potential investors.⁷² For example, the political instability in India caused Volkswagen to switch the location of a joint venture with Eicher from India to China.⁷³ Indian political parties express varying views on foreign investment. Many parties believe in *swadeshi* (self-reliance) and are hostile toward foreign investors and international institutions,⁷⁴ believing foreign investment threatens existing jobs and worker's rights, others strongly favor foreign investment because of its positive effect on the economy. Large Indian businesses also criticize foreign investment as causing increased and unfair competition.⁷⁵ Indian companies pay high interest rates, while foreign companies access lower rates abroad.⁷⁶

IV. CORRUPTION IN INDIA

A. Causes of Corruption in India

World War II (WWII) caused highly unsettled conditions in India.⁷⁷ WWII resulted in partition of the country and led to inflationary conditions which slowed economic stabilization.⁷⁸

69. *See id.* at 27.

70. *See id.*

71. *See Kaushik, supra* note 67.

72. *See Jayshree Sengupta, Foreign Investors Face Discouraging Problems, INDIA ABROAD*, Sept. 20, 1996, at 2.

73. *See COUNTRY REPORT, supra* note 68, at 27.

74. *See id.* at 13.

75. *See id.* at 18.

76. *See id.*

77. S.K. GOSH, LAWS RELATING TO BRIBERY AND CORRUPTION IN INDIA 1 (1971).

78. *See id.*

Compounding this problem, India spent unprecedented amounts of money on huge projects to increase services in the nation. While well-intentioned, these massive projects lacked the necessary supervision,⁷⁹ which led to wide scale corruption. One author attributes corruption and decline in moral values as a casualty of war.⁸⁰

A poignant example of the level of corruption can be seen in the Indian Civil Supplies department, where corruption is rampant in activities such as issuing permits and licenses.⁸¹ Central Government activities are also affected by bribery and rampant corruption.⁸² It was only a matter of time before this corruption spread to India's political parties.

Political corruption originated in the 1970s. After a ban on corporate donations, political parties became corrupt in raising needed election funds.⁸³ In the late 1970s and 1980s, higher costs associated with politics made the situation of "black" money donations worse and led to kickbacks on government contracts.⁸⁴

Demands for bribes also became more prevalent at the state level. Beginning in 1971, state and central government elections were held separately, thereby doubling the cost of elections.⁸⁵ Additionally, the central government lost some of its power to grant licenses for imports and for entrance into certain industries to state governments.⁸⁶ This shift in power allowed state governments to use their independent power to obtain kickbacks.⁸⁷

The corruption that began after WWII continued into the 1990s as a product of tradition, environment, economics, and lack of public condemnation.⁸⁸ Currently, many gaps exist in the law

79. *See id.*

80. *See id.*

81. *See id.* at 2.

82. *See id.* Corruption is on the rise in the following departments and organizations: Railway, Income Tax, Central Excise and Customs, Military Engineering Service, Defense Production Organization, Central Public Works, Life Insurance, and Air Lines Corporation. *See id.*

83. *Prosecutions May Reverse the Tide of Corruption*, INDIA BUS. INTELLIGENCE, Jan. 24, 1996, available in 1996 WL 8327780 [hereinafter *Prosecutions*].

84. *See id.*

85. *See id.*

86. *See* T. Thomas, *Lessons From Enron*, ASIAN WALL ST. J., January 30, 1996, available in 1996 WL-WSJA 3325955.

87. *See Prosecutions*, *supra* note 83.

88. *See* GOSH, *supra* note 77, at 3.

which create opportunities for corruption. In addition, rampant poverty in India contributes to corruption because economically deprived individuals more easily fall victim to the temptation of bribes.⁸⁹ Government workers, however, tend to earn more than the average citizen and their economic status cannot be the basis for the corruption in which they engage. A *hawala*, or an illegal foreign exchange dealer, claimed to have paid bribes in exchange for favors to more than 100 bureaucrats, ruling party, and opposition politicians.

Clearly, the system of kickbacks and commissions decreases the amount and quality of investment needed in India. Bribes increase production costs, thus, neutralizing the cost advantage of doing business in a developing country.⁹⁰ Not only does bribery reduce the cost effectiveness of foreign investment in India, but it also exposes American companies to criminal liability under the FCPA.⁹¹

B. Indian Laws Regarding Corruption and Bribery

Indian law does condemn bribery, though these laws are frequently ignored. The Indian Penal Code and the Prevention of Corruption Act of 1947 are the principal statutes prohibiting corruption and bribery.

1. Indian Penal Code

The Indian Penal Code contains three specific sections which prohibit bribery. Indian Penal Code, section 161 prohibits public servants from taking illegal bribes.⁹² Under this section, public servants who accept any gratuity to influence the exercise of their official functions face imprisonment of up to three years, a fine, or both.⁹³ It also defines such terms as, public servant, gratification, and bribes.⁹⁴ For a gratuity to constitute a bribe, it is not necessary that the motive be corrupt or oppressive, or that the recipient appropriated the money.⁹⁵ The commentary includes analogous laws, procedure and practice, and describes the proof necessary to

89. *See id.*

90. *See id.*

91. *See supra* Part II.

92. *See* JASPAL SINGH, *THE INDIA PENAL CODE* 545 (1994).

93. *See* H.P. VARSHNI, *LAW OF BRIBERY AND CORRUPTION* 37 (1963).

94. *See* SINGH, *supra* note 92, at 545.

95. *See id.* at 546-47.

sustain a charge of bribery.⁹⁶

Section 162 forbids taking a gratuity by corrupt or illegal means in order to influence a public servant.⁹⁷ Section 165 condemns a public servant who obtains valuable things without consideration from a person who transacts business with the public servant.⁹⁸ Specifically, it provides that any public servant who:

[A]ccepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.⁹⁹

The proceeding or business referred to in Section 165 must be a transaction by the public servant. If the transaction is not conducted by him personally, it must have some connection with the official functions he performs.¹⁰⁰ The wording of Section 165 is vague enough to include proceedings or business conducted through a court or public office as well as business conducted by subordinates under the immediate direction of the official supervisor.¹⁰¹ As noted, most of the Indian laws dealing with bribery relate to *acceptance of a bribe* and not to the act of *giving a bribe* for favored treatment. Most foreign companies, therefore, still make bribes as they do not fear prosecution under Indian law.

2. Prevention of Corruption Act of 1947

After India gained independence from Britain, the Indian legislature passed the Prevention of Corruption Act of 1947 which modified sections of the Indian Penal Code.¹⁰² In 1962, the

96. *See id.* at 550.

97. *See id.* at 555 (wording is similar to Indian Penal Code Section 161).

98. *See id.* at 559.

99. *Id.*

100. *See id.*

101. *See id.* at 547.

102. *See* LESLIE PALMIER, *THE CONTROL OF BUREAUCRATIC CORRUPTION: CASE STUDIES IN ASIA* 13 (1985).

government formed the Committee on Prevention of Corruption to review anti-corruption legislation and to make suggestions to increase their effectiveness.¹⁰³ This committee gave rise to other groups such as the Administrative Vigilance Division (AVD), the Central Bureau of Investigation (CBI), and the Central Vigilance Commission (CVC). The function of the CVC is essentially investigatory while the CBI has the function of both investigation and prosecution.¹⁰⁴

Although India has taken steps to deal with internal corruption, its laws only address corruption among public servants. Bribery is an offense under the Indian Penal Code only when it deals with persons who are, or expect to be public servants.¹⁰⁵ It does not refer to others who accept bribes in the course of business. Bribery, therefore, continues to pose a problem for U.S. companies doing business in India.

C. Recent Corruption Scandals in India

Many scandals have recently been exposed in India. P.V. Narashima Rao's government has had a history of bribery scandals. In 1983, an expatriate businessman alleged that he paid \$100 thousand to a Rao acquaintance in a failed bid to win a state contract.¹⁰⁶ In addition, the CBI also questioned the prime minister's son regarding a \$40 million kickback scandal linked to fertilizer imports from Turkey.¹⁰⁷

Other major scandals have also affected foreign investment in India. In 1987, Prime Minister Rajiv Gandhi's government allegedly accepted kickbacks from AB Bofors, a Swedish arms manufacturer, to secure a \$1.3 billion artillery contract.¹⁰⁸ India's most significant financial scandal erupted in April 1992. Banks and brokers colluded illegally to siphon \$1.3 billion from the inter-bank securities market to fuel the Bombay Stock Exchange.¹⁰⁹

In another incident, the police accused Prime Minister Rao of buying votes. The alleged vote-buying occurred during the 1993 no-confidence motion in Parliament, which Rao's then minority

103. *See id.*

104. *See id.* at 15.

105. *See* VARSHNI, *supra* note 93, at 1.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

government won by a thin margin.¹¹⁰ Furthermore, in January 1996, an \$18 million political bribery scandal resulted in the resignation of seven of Rao's ministers and two governors.¹¹¹ They faced bribery charges brought by the CBI regarding an illegal foreign exchange scandal.¹¹²

Sukh Ram, Communications Minister in the Rao government, faces allegations that he illegally issued basic and cellular telecommunication licenses to private parties.¹¹³ The CBI accused Sukh Ram of accepting kickbacks from a company which sold radio equipment to the government.¹¹⁴ The CBI discovered roughly 36 million rupees (US \$1 million) hidden in Sukh Ram's New Delhi and Mandi houses.¹¹⁵ He is also accused of favoring a little-known telecommunications firm, from his home state, Himachal Futuristic Communications Limited (HFCL), by granting them licenses for basic and cellular telecommunication services.

D. Effect of Corruption on Foreign Investment in the Telecommunication and Power Sector

As previously discussed, a company is exposed to FCPA liability if they are "aware of a high probability of the existence of [the] circumstances [for improper payment]."¹¹⁶ One factor in establishing whether a company or individual is aware of a "high probability" of such circumstances is when the country in question has a recognized problem with bribery.¹¹⁷ Many U.S. companies are deterred from doing business in countries, such as India, which have well-documented cases of corruption because of the threat of FCPA liability.

Corruption has the most adverse impact on foreign investors in the telecommunications and power industries¹¹⁸ because these

110. *See id.*

111. *See A Major Scandal a Year*, INDIA POST, Sept. 27, 1996, at A12.

112. Narayanan Madhavan, *Rift Seen Between Rao, Manmohan Over Scams*, INDIA WEST, Sept. 20, 1996, at A8.

113. *See* Nikhil Chakravartty, *Sukh Ram Scam Is a Matter of Shame, Concern*, INDIA WEST, Sept. 6, 1996, at A4.

114. *See Sukh Ram Arrested by CBI in Telecom Scandal*, INDIA WEST, Sept. 20, 1996, at A15 [hereinafter *Sukh Ram Arrested*].

115. *See id.*

116. *See* 15 U.S.C. § 78dd-2(h)(3)(B).

117. *See* Executive Legal Summary, *Bribery Provisions of the FCPA*, Foreign Corrupt Practices Act, Vol. 1, Apr. 1995, at 100.007.

118. *See Sukh Ram Arrested*, *supra* note 114, at A15.

sectors offer the highest investment return for foreign companies.¹¹⁹ Due to the numerous scandals of corruption, foreign investors may be reluctant to begin operations in India. There are reports that many foreign investors in cellular and basic services are not paying license fees necessary to commence operations.¹²⁰ These scandals have further deterred many American companies from doing business in India.¹²¹

The Indian telecommunications sector is poorly developed with an average of eighty-five people per telephone connection.¹²² In May 1994, the telecommunications sector opened to private enterprise through the National Telecom Policy.¹²³ The government, however, continued to maintain regulatory powers over the telecommunications sector.¹²⁴ The basic idea was to enable the government to collect about 1 trillion rupees (approximately U.S. \$28 billion) in license fees to improve existing facilities.¹²⁵ The power to grant licenses, however, lies with the Communications Ministry, whose officials often divert the money for personal gain. Naturally, this makes foreign investors hesitant to invest in India.

As a result of the Sukh Ram scandal, telecommunication companies face difficulties in securing investors to help finance their huge commitments in basic and cellular services in India.¹²⁶ Investors are wary of putting their money in potentially tainted companies. For example, HFCL made commitments to pay a license fee of 27,795 crore rupees (approximately U.S. \$7 billion) over fifteen years for its basic service networks.¹²⁷ To raise its share of the funds, the company planned to sell a large part of its equity at a huge premium. Because of the corruption scandals, however, HFCL faces serious difficulties in getting investors to

119. John Elliot, *India's Slide Into Sleeze*, ASIAN WALL ST. J., Nov. 13, 1995, available in 1995 WL-WSJA 10228169.

120. See Sengupta, *supra* note 73, at 2.

121. See *American Investors Wary of India, Says U.S. Diplomat*, INDIA J., Sept. 13, 1996, at C4. Jonathan M. Bensky, US Commercial Counselor, says that investors view India as "high risk business," and further states that "corruption is a fact in India which is a major concern for several US business houses." *Id.*

122. See Sengupta, *supra* note 72, at 2.

123. See *id.*

124. See *id.*

125. See *id.*

126. See *The Price of Corruption*, INDIA TODAY, Sept. 30, 1996, at 4 [hereinafter *Price of Corruption*].

127. See *id.*

commit funds for the project.¹²⁸

In 1993, the media reported that a U.S. company lost a power project to a European competitor because it refused to pay a thirty million dollar bribe to a chief minister.¹²⁹ Such corrupt practices have resulted in poorly constructed and unreliable power sources which have led to widespread power shortages. These power shortages compound the problem and further deter foreign investment.¹³⁰

Moreover, the process of approving power projects is very inefficient.¹³¹ Approval for such projects must be given by the Cabinet Committee of Economic Affairs, which must initially clear all projects, and by the Foreign Investment Promotion Board, which must clear all large projects.¹³² The projects are then subject to review by the Central Electricity Authority (CEA), the Finance Ministry, and the Environment Ministry.¹³³ Lack of coordination among these governmental entities commonly leads to long delays in the approval process.¹³⁴ A "fast track" system, however, will soon be used to accelerate the process for approving projects which have a capacity of up to 250 megawatts and a cost of 10 billion rupees (about U.S. \$280 million).¹³⁵

To address India's power shortage problem, the central government approved the Enron power plant construction.¹³⁶ The Dabhol Power Company project was 100% foreign-owned with "Enron as energy supplier, General Electric as equipment supplier, and Bechtel as the building contractor."¹³⁷ Enron has had great difficulty doing business in India and abiding by the FCPA. Notwithstanding their compliance with the FCPA, Enron was accused of violating the Indian Electricity Act and the Indian Electricity Distribution Act.¹³⁸

Enron allegedly received the power plant contract without

128. See *id.*

129. See Elliot, *supra* note 119.

130. See Sengupta, *supra* note 72, at 2.

131. See *id.*

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.*

136. See Kaushik, *supra* note 67.

137. See Thomas, *supra* note 86.

138. See *Dabhol/Enron Dispute Reaches the Brink*, POWER ASIA, July 10, 1995, available in 1995 WL 8527651 [hereinafter *Dabhol/Enron*].

following the normal competitive bidding process and without gaining the approval of the Maharashtra state government, where the plant was to be constructed.¹³⁹ The new city leaders called the deal corrupt, even though it had been approved by the previous state government.¹⁴⁰ They did not like the proposed cost of the power plant and requested that the contract be re-negotiated using a proper competitive bidding process.¹⁴¹ They claimed the sponsors "should not be paid a single penny,"¹⁴² alleging that Enron paid bribes to obtain approval permits for the power project.¹⁴³

Many Indians believed that a \$920 million project could not be approved without resorting to bribery.¹⁴⁴ At this point, the Enron joint venture had already expended \$400 million toward the project. Enron CEO, Rebecca Mar, commented that the "project shall not fall victim to local politics."¹⁴⁵ After examining the project, the U.S. government stated it had no reason to suspect that Enron had violated the FCPA.¹⁴⁶ In reality, this proved to be a political fight between the central and state government, resulting in foreign investors losing confidence in India's investment opportunities.¹⁴⁷ Subsequently, Enron and the state government agreed to a new contract with a new pricing structure for the distribution of power to the consumers.¹⁴⁸

V. BENEFITS AND BURDENS OF THE FCPA

Many U.S. companies perceive the FCPA as a competitive disadvantage because the conduct prohibited by the FCPA is not illegal in other countries. For example, paying bribes is still legal throughout Europe.¹⁴⁹ But even more troublesome for U.S. companies is that for citizens and companies in Japan, Germany, and Britain, bribery of foreign officials is not only legal, but also

139. See Kaushik, *supra* note 67.

140. See Christopher Thomas, *Mutton on the Menu at India's McDonald's*, TIMES (London), Jan. 12, 1996, available in 1996 WL 6466522.

141. See Kaushik, *supra* note 67.

142. See *id.*

143. See Elliott, *supra* note 119.

144. See *id.*

145. *Dahbol/Enron*, *supra* note 138.

146. See *id.*

147. Kaushik, *supra* note 67.

148. See *id.*

149. See *Need to Tap Institutional Investors for Power Projects Seen as Critical*, INDEP. POWER REP., Oct. 20, 1995, available in 1995 WL 8120522.

tax-deductible.¹⁵⁰ As such, U.S. companies often lose contracts to foreign competitors who are allowed to bribe foreign officials to secure a deal.

Dissatisfied with the FCPA, many companies and banks pay foreign representatives large salaries to indirectly finance the bribes.¹⁵¹ Additionally, U.S. companies often adopt joint venture partners who can make payments unilaterally, thus allowing the U.S. companies to later claim ignorance of the details. U.S. companies are taking these measures because of the multitude of opportunities arising in corrupt countries.

Others believe, however, that the FCPA has not caused U.S. businesses to suffer. A study by John Graham and Mark McKean of the University of Southern California and the University of California, Irvine, respectively, compared the United States' share of exports in countries characterized as corrupt with the share in countries considered to be non-corrupt.¹⁵² Although far from conclusive, the study showed that U.S. exports were roughly equivalent in both types of countries during 1977-1984.¹⁵³

Furthermore, many argue that the United States and its companies should maintain honesty and fair dealing in its foreign business transactions, even if it is economically disadvantageous. They believe illicit payments undermine the values upon which democratic nations thrive. Bribery causes political instability and interferes with foreign policy. Foreign corrupt payments also produce waste and distort prices in the host foreign countries—because the corrupt foreign official often makes decisions out of self-interest to the detriment of the country's economy.¹⁵⁴

VI. INDIA'S EFFORTS TO COMBAT CORRUPTION

India recognizes that their current laws are ineffective in preventing and punishing bribery and corruption, and that bribery scares away potential foreign investors, especially U.S. companies. Indian legislatures and country leaders are suggesting new solutions to the problem. Prime Minister Deve Gowda is considering introducing a bill establishing an ombudsman to

150. See *On the Take*, THE ECONOMIST, Nov. 19, 1988.

151. See Elliott, *supra* note 119.

152. See Hall, *supra* note 47, at 299 citing *On the Take*, The Economist, Nov. 19, 1988.

153. See *id.*

154. See *The Political Scene: Corruption is Spreading*, ECONOMIST INTELLIGENCE UNIT, June 1, 1993.

spearhead the effort to remove corruption in India.¹⁵⁵ The effort may be futile, however, because this is the sixth time that Parliament has introduced such a bill in the last twenty-eight years, all to no avail.¹⁵⁶

VII. THE PRACTICALITY OF SUGGESTED SOLUTIONS

Both U.S. and Indian law should address the problem of corruption in India. First, Congress should not abolish the FCPA merely because it does not eliminate the problem of corruption plaguing third world countries, such as India. The United States should continue to stand firm and pressure international agencies to implement international laws prohibiting bribery of foreign officials.¹⁵⁷ More importantly, as a world leader, the United States needs to urge other countries to support and comply with proposed international laws regulating bribery of foreign officials. The United States must demonstrate the benefits of these proposed international laws that are equivalent to the FCPA.

Secondly, India needs to take a tougher stance against corruption and bribery to keep foreign investors interested in India. The legislature needs to amend the laws to punish not only public servants who receive bribes, but also those businesses and companies who offer the bribes. The government needs to enforce the laws, and strengthen the fines and sentencing of such violations.

In addition, the number of intermediaries involved in procedures, such as granting licenses, should be reduced. Reducing the number of intermediaries will eliminate the loopholes where corruption and bribery most often occur. Laws should also require the consent or authorization of more than one person for non-clerical decisions. Such procedures make corruption more difficult because the corruption requires collaboration and, initiates a system of checks and balances. Implementation and consistent enforcement of such laws and procedural changes will cause companies to fear discovery and punishment. Therefore, they are less likely to engage in corruption and bribery.

155. See *Anti-Corruption Bill for Parliament, Says PM*, INDIA POST, Sept. 27, 1996, at A6.

156. See *id.*

157. For a discussion of international efforts to fight corruption, see Hall, *supra* note 47, at 313.

India should also create a state fund to finance the expenses of recognized political parties.¹⁵⁸ Corruption has had a major impact as political parties look for alternative sources to raise election funds.¹⁵⁹ Creating a state fund and implementing policies that set limits on campaign costs would reduce the incentive for obtaining black market money.

The Indian government can also make the process of privatization more "transparent."¹⁶⁰ This involves the continuation and expansion of competitive bidding, and possibly the introduction of the U.S. practice of holding public hearings, where all information on the project is available for scrutiny.¹⁶¹ The information becomes a matter of public record and may help provide a check on illegal behavior.

Other options exist for U.S. companies to deal with the FCPA when doing business in India and while the above actions are pending. For example, an alliance with a local Indian partner is helpful because the partner can cut through the red tape without resorting to bribery.¹⁶² Projects in politically sensitive sectors, such as the power or telecommunications sectors, benefit particularly from shared ownership.¹⁶³ The Indian partners' local status sometimes gives them a business advantage without resorting to bribery.

Another suggestion is for U.S. companies to use "legal bribery as an alternative to kickbacks and normal monetary bribes."¹⁶⁴ "Legal bribery" is offering benefits such as information on new technologies, prestige, recognition, or donations to local charities as a bargaining tool in obtaining a contract in a developing country such as India.¹⁶⁵

Most importantly, U.S. companies must inform employees of FCPA provisions. Employees need to be aware of what actions violate the FCPA and then avoid such activity. Moreover, the companies need to train their employees in how to avoid falling prey to bribery in foreign countries while still securing contracts.

158. See *Prosecutions*, *supra* note 83.

159. See *supra* Part IV.A.

160. See *Price of Corruption*, *supra* note 126.

161. See *id.*

162. See Rajesh Kumar, *Order Amid Chaos: Doing Business In India*, ASIAN WALL ST. J., May 23, 1996, available in 1996 WL-WSJA 10214147.

163. See *id.*

164. See Poon, *supra* note 20, at 353.

165. See *id.*

VIII. CONCLUSION

If U.S. companies continue to support bribing of foreign political officials, it will undermine the democratic process and economic and political development of the foreign country, in exchange for U.S. economic gain. Such behavior is properly condemned by the United States through the FCPA. Despite the problems of corruption and bribery facing the country, India is still a lucrative site for foreign investment. Furthermore, some reforms have taken place in India. Recently, a large number of politicians were prosecuted for receiving kickbacks on deals signed by their ministries. These recent government prosecutions are beginning to unravel the damage caused by twenty-five years of corruption in India.¹⁶⁶ This has begun to increase foreign confidence and investment in India. In addition to other viable solutions, these current efforts to combat the problem will pave the way for U.S. companies to successfully invest in India without violating the FCPA.

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166. See *Prosecutions*, *supra* note 83.

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